

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
FairPoint Communications Missouri, Inc.)	WC Docket No. 10-90
)	
Petition for Waiver or Clarification of)	WC Docket No. 05-337
Section 54.313(h) of the Commission's Rules,)	
47 C.F.R. §54.313(h))	

**PETITION FOR WAIVER OR CLARIFICATION TO REINSTATE HIGH-COST
SUPPORT**

FairPoint Communications Missouri, Inc. ("FairPoint") hereby requests that the Commission clarify or grant a limited waiver of its rules to reinstate federal high-cost support to which FairPoint is entitled for July through December 2012 under the Commission's rules, but which was denied due to an apparent inconsistency between two of the Commission's rate floor rules, and an error in complying with Commission reporting requirements. For the reasons stated below, grant of the limited relief requested herein would serve the public interest by restoring critical funding to a rural local exchange carrier ("LEC") serving a high-cost study area.

I. BACKGROUND

A. The Local Urban Rate Floor and the Third Order on Reconsideration

FairPoint is a cost-based rate-of-return regulated LEC providing local exchange and exchange access services, as well as advanced services, to residential and business customers in rural areas of Missouri.¹ Under the *USF/ICC Transformation Order*² and Section 54.318 of the

¹ FairPoint participates in the National Exchange Carrier Association ("NECA") traffic-sensitive pool.

Commission's rules, the high-cost support of LECs such as FairPoint was subject to reduction beginning July 1, 2012 if the carrier's local residential voice rate was not at or above the local urban rate floor specified in the Commission's rules.³ For the period beginning July 1, 2012 and ending June 30, 2013, the local urban rate floor is \$10.⁴ As explained below, *FairPoint's local residential voice rate was \$10 as of July 1*, so FairPoint should not have experienced any reduction in high-cost support under this rule. However, another Commission rule, Section 54.313(h)(1), which sets forth the operative local rate reporting requirement, provides that incumbent LECs who receive high-cost support must report their local residential voice rates (as defined in the local urban rate floor rule cited above) in effect as of January 1; this rule was revised in the Commission's *Third Order on Reconsideration* released May 14, so that the relevant rates became those in effect *as of June 1*.⁵ While Section 54.313(h)(2) permits LECs to file updates of their local residential voice rates on January 2 of each year, reporting rates in effect as of December 1, nothing in this rule suggests that support that was reduced under Section 54.318(b) would be retroactively restored if the LEC established that its rates, in fact, were at or above the rate floor as of June 1.

² The Commission's *USF/ICC Transformation Order* became effective on December 29, 2011. See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 *et al.*, FCC 11-161 (rel. Nov. 18, 2011), 76 Fed. Reg. 73830 (Nov. 29, 2011) ("*USF/ICC Transformation Order*").

³ 47 C.F.R. §54.318(b) (the "local residential voice rate" is defined specifically as the "flat rate for residential local service plus state regulated fees offered for voice service"); 47 C.F.R. §§54.318(f) (the term "local urban rate floor" means "the national average of local urban rates plus state regulated fees under the schedule provided in [Section 54.318(f) of the Commission's rules]").

⁴ 47 C.F.R. §54.318(f)(1).

⁵ 47 C.F.R. §54.313(h)(1), *as modified by the Third Order on Reconsideration* in WC Docket Nos. 10-90 *et al.*, FCC 12-52 (rel. May 14, 2012) ("*Third Order on Reconsideration*").

B. FairPoint's Local Residential Rate

Local rate filings in Missouri were made in compliance with Section 54.318(f)(1) well in advance of the anticipated July 1 effective date. Indeed, when the Commission's *Third Order on Reconsideration* was released on May 14, making the effective date of the local urban rate floor June 1, FairPoint already had filed (on May 11, 2012) its revised local residential voice rates to comply with the local urban rate floor, to be effective as of July 1. Missouri requires 30 days' notice prior to effectiveness of tariff changes, so it appeared that it might be impossible after May 14 to file new rates that would be effective June 1. Nevertheless, the Missouri Public Service Commission ("PSC") adopted an order on May 24 expediting the effective date of FairPoint's and the other affected LECs' tariffs, so they became effective as of June 1, 2012, in conformity with Section 54.313(h)(1).⁶ Since June 1, therefore, FairPoint has been in compliance with the local urban rate floor.

Notwithstanding the apparent contradiction between the two Commission rules, FairPoint's local residential voice rate in fact was at the specified local urban rate floor not only as of July 1, 2012, in accordance with the requirement of Section 54.318(f)(1), but also as of June 1, 2012, in satisfaction of the requirement of Section 54.313(h)(1). In further compliance with the Commission's rules, FairPoint attempted to make the required certification to NECA in a timely fashion on June 19, 2012. However, FairPoint failed to report the local residential voice rate that took effect as of June 1, which was \$10. Instead, FairPoint inadvertently reported the rate billed as of the last billing cycle, which was below the local urban rate floor, because customers had not yet been billed at the new rate which did equal the local urban rate floor. As a

⁶ A copy of the PSC's May 24, 2012 "Order Approving Tariffs and Granting Motions for Expedited Treatment" is attached.

result of this inadvertent error in reporting its local residential voice rate to NECA, FairPoint became ineligible for high-cost support for six months, from July through December 2012 – a loss of \$88,854 in high-cost support. Thus, a waiver or clarification of the rules is required.

II. GRANT OF LIMITED WAIVER RELIEF OR CLARIFICATION WOULD SERVE THE PUBLIC INTEREST

The Commission may waive its rules for “good cause shown.”⁷ More specifically, the Commission may exercise its discretion to waive a rule where, due to special circumstances, deviation from the general rule would better serve the public interest than strict adherence to the general rule.⁸ The Commission may take into account consideration of hardship, equity, or more effective implementation of overall policy on an individual basis.⁹ The instant request meets this standard.

The Commission’s recent *USF/ICC Transformation Order* significantly altered the landscape of federal regulation for incumbent LECs such as FairPoint. Compliance with the Commission’s many rule changes and new reporting requirements has been challenging for FairPoint and its affiliated LECs. As the Commission has observed, rate-of-return carriers face unique challenges responding to changes in regulation and market conditions.¹⁰ Indeed, the Commission expressed a desire in the *USF/ICC Transformation Order* to mitigate the potential adverse effects of its new rules on rate-of-return carriers and their customers.¹¹

⁷ 47 C.F.R. § 1.3.

⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁰ *See, e.g., USF/ICC Transformation Order* at ¶891.

¹¹ *See USF/ICC Transformation Order* at ¶ 801.

The Commission should grant a waiver in this case so as to avoid the undue hardship on FairPoint and its customers that would be caused by FairPoint's loss of six months' support, which FairPoint estimates to be \$88,854 (\$14,809 per month). This support represents a significant portion of the revenue on which FairPoint relies to continue to invest in its network serving rural Missouri. Without it, customer service could be put at risk.

The Commission should grant a waiver of Section 54.313(h)(1) so that FairPoint and its customers are not adversely affected by FairPoint's inadvertent failure to report its rates in effect as of June 1 (reporting instead the rates that were in effect the prior month and billed in mid-June). FairPoint's error is without material consequence, since its rates actually in effect as of June 1 were set in compliance with the rate floor. Grant of the requested waiver will harm no party. However, in the absence of a waiver, FairPoint would be penalized for having reported its prior rates, rather than those in effect on June 1. This would not serve the purpose of the rule.

While FairPoint may, under the revised rules, update its local residential voice rates to reflect conformity with the local urban rate floor as of January 2, 2013, this optional mid-year update was adopted for carriers that increased their local residential voice rate between June 1 and December 1, such that any associated support reductions could be reduced or eliminated in the second half of the year.¹² Though Office of Management and Budget approval of this mid-year update apparently remains pending, FairPoint intends to notify NECA and USAC on or before January 2, 2013 that its local residential voice rates in effect as of December 1 comply with the specified rate floor so that FairPoint will not be subject to any high-cost support reduction for January through June 2013.¹³ The rule does not appear to provide for correction of prior filings or retrospective reinstatement of support, however. Grant of the waiver requested

¹² *Third Order on Reconsideration* at para. 20; 47 C.F.R. §54.313(h)(2).

¹³ *See Third Order on Reconsideration* at para. 20 & n. 51.

herein is therefore necessary in the interest of equity and to avoid undue hardship. The policy underlying the Commission's rules would be served by grant of a waiver of Section 54.313(h)(1) in this case.

III. IN THE ABSENCE OF A WAIVER, THE COMMISSION SHOULD CLARIFY THAT JULY 1, NOT JUNE 1, IS THE OPERATIVE DATE FOR THE LOCAL URBAN RATE FLOOR

The inconsistency between Sections 54.313(h)(1) and 54.318(f)(1) of the Commission's rules initially may not have been recognized, but the policy underlying Section 54.318 is undermined by the June 1 date set forth in Section 54.313(h)(1). The Commission adopted Section 54.313(h) "to limit high-cost support where end-user rates do not meet a specified rate floor."¹⁴ The Commission specifically announced that the rate floor would be phased in over three steps, "beginning with an initial rate floor of \$10 for the period July 1, 2012 through June 30, 2013."¹⁵ Nothing in the text of the *USF/ICC Transformation Order* suggests that an incumbent LEC's local residential voice rate had to comply with the rate floor sooner than July 1, 2012 in order to remain eligible for high-cost support.

Section 54.313(h)(1) of the rules is a reporting requirement. The Commission should clarify that the June 1 date set forth in Section 54.313(h)(1) was adopted as an administrative convenience, merely to establish a point in time as of which rates should be reported, but was not intended to penalize carriers whose rates were compliant with the urban rate floor as of July 1 but not sooner. Indeed, all evidence suggests that the Commission intended July 1 to be the operative date for purposes of the local urban rate floor. If the Commission does not waive Section 54.313(h)(1) as requested above, it should clarify that if a LEC has met the rate floor

¹⁴ *USF/ICC Transformation Order* at ¶235.

¹⁵ *USF/ICC Transformation Order* at ¶239. Under the rules adopted to implement this section of the order, the effective date for the new local urban rate floor each year is July 1, not June 1. -- set at \$10 beginning on July 1, 2012; \$14 beginning on July 1, 2013; etc. 47 C.F.R. §54.318(f).

requirements of Section 54.318(f) according to the schedule set forth therein, then its support will *not* be reduced under Section 54.318(b). Thus, the Commission should clarify that the sentence, “Carriers shall report lines and rates on effect as of June 1” set forth in Section 54.313(h)(1) shall not be enforced to the extent that it is inconsistent with the intent of Section 54.318 as clarified.

IV. CONCLUSION

For the foregoing reasons, a waiver of Section 54.313(h)(1) is appropriate to prevent undue hardship and to serve the policy underlying the Commission’s rule. Alternatively, FairPoint respectfully requests that the Commission acknowledge the ambiguity created between two rules, Sections 54.313(h)(1) and 54.318(f)(1), and clarify that the operative date for compliance with the urban rate floor is July 1 rather than June 1.

Respectfully submitted,

/s/

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Attachment A

Missouri Public Service Commission
Order Approving Tariffs and Granting Motions for Expedited Treatment
(issued May 24, 2012)